USRA TAMPI (M) SDN BHD

v.

MBF PROPERTY TRUST MANAGEMENT BHD

COURT OF APPEAL, KUALA LUMPUR
MOHD SAARI YUSOFF JCA
PAJAN SINGH GILL JCA
RICHARD MALANJUM JCA
[CIVIL APPEAL NO: W-02-843-99-1999]
22 MAY 2003

CIVIL PROCEDURE: *Summary judgment - Land - Sale and purchase of - Prior consent of State Authority not obtained - Whether deposit to be refunded - Whether there were triable issues - Whether application to be granted - Rules of the High Court 1980, O. 14*

The defendant entered into a sale and purchase agreement ('the said agreement') with the plaintiff whereby the former undertook to procure a piece of land in Shah Alam ('the said land') for the plaintiff for the price of RM22,500,000. The plaintiff paid a deposit of 10% of the purchase price. It was a term in the agreement that the defendant was required to apply and obtain written consent from the State Authority for the said land to be transferred to the plaintiff. The defendant failed to do so and the plaintiff sought for a refund of the deposit paid. At the High Court, the trial judge granted the plaintiff's application for a summary judgment filed under O. 14 of the Rules of the High Court 1980. Dissatisfied, the defendant appealed to this court. It argued that it was entitled to forfeit the deposit under cl. 20 of the agreement as the plaintiff had failed to apply for the approval of the Foreign Investment Committee in relation to the said transaction.

Held:
Mohd Saari Yusoff JCA

[1] It was immaterial that the plaintiff did not apply for the Foreign Investment Committee's approval as prior consent of the State Authority had not been obtained by the defendant. Therefore, the trial judge was correct in granting the plaintiff's application for a summary judgment in absence of any triable issues. (pp 159 g-h & 160 a)

[Defendant's appeal dismissed with cost.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Defendan telah memasuki suatu perjanjian jualbeli ('perjanjian tersebut') dengan plaintif di mana defendan telah bersetuju untuk mendapatkan sebidang tanah di Shah Alam ('tanah tersebut') untuk plaintif dengan harga RM22,500,000. Plaintif kemudiannya telah membayar deposit 10% terhadap harga pembelian tersebut. Adalah merupakan satu terma dalam perjanjian tersebut di mana defendan dikehendaki untuk memohon dan mendapatkan kebenaran bertulis daripada Pihak Berkuasa Negeri untuk pemindahan hakmilik tanah tersebut ke atas nama plaintif. Defendan gagal melakukannya dan plaintif memohon pemulangan kembali wang pendahuluannya. Di Mahkamah Tinggi, hakim bicara telah membenarkan permohonan plaintif untuk penghakiman terus yang difailkan di bawah A. 14 Kaedah-kaedah Mahkamah Tinggi 1980. Berasa tidak puas hati dengan keputusan tersebut, defendan telah membuat rayuan ke mahkamah ini. Ia mengadu bahawa ia berhak melucut hak terhadap deposit tersebut di bawah kl. 20 perjanjian tersebut kerana plaintif gagal untuk mendapatkan kebenaran Jawatankuasa Pelaburan Asing berkenaan urusan jualbeli berkenaan.

Diputuskan:
Mohd Saari Yusoff HMR

[1] Sememangnya tidak terdapat apa-apa kesan atas kegagalan plaintif mendapatkan kebenaran daripada Jawatankuasa Pelaburan Asing kerana persetujuan daripada Pihak Berkuasa Negeri haruslah diperolehi terlebih dahulu. Oleh yang demikian, hakim bicara dengan wajarnya telah membenarkan permohonan plaintif untuk penghakiman terus dengan ketiadaan isu-isu yang boleh dipertikaikan.

Rayuan defendan ditolak dengan kos.]

Case(s) referred to:
MBf Property Trust Management Bhd v. Usra Tampi (M) Sdn Bhd [2000] 1 CLJ 530 HC ***(refd)***
National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14

For the appellant - Stanley KW Chang (CH Loh); M/s Stanley Chang & Partners
For the respondent - Alvin John (Ismail Mohd Arifin); M/s Rashid & Lee

[Appeal from High Court, Kuala Lumpur; Suit No: MT1-22-701-98]

Reported by M Maheswaran

JUDGMENT

Mohd Saari Yusoff JCA:

In the court below, the respondent ("the plaintiff) applied for summary judgment under O. 14 of the Rules of the High Court 1980 for refund of deposit. The learned trial judge entered judgment for the plaintiff, hence this appeal by the appellant ("defendant").

The gist of the plaintiff's case was that on 13 July 1996, the plaintiff and the defendant entered into an agreement whereby the defendant undertook to procure for the plaintiff land held under H.S.(D) 98505, P.T. 719, Seksyen 16, Lot 2, Jalan 16/6, Bandar Shah Alam (hereinafter referred to as "the said land"). As consideration, the plaintiff would pay the defendant purchase price of RM22,500,000. After execution of the agreement, the plaintiff paid deposit of RM2,250,000.

It is to be noted that the title of the said land was subject to restriction in interest, which read as follows:

> Tanah ini tidak boleh dijual, dipajak, digadai atau dipindahmilik dengan apacara sekalipun melainkan dengan kebenaran Pihak Berkuasa Negeri.

The agreement was subject to a number of condition precedents. One of the condition precedents was that the defendant was required to apply and obtain written consent from the State Authority for the said land to be transferred to the plaintiff.

Under the agreement, all condition precedents must be fulfilled within a period of nine months from the date of the agreement. The parties have not agreed on extension on time after expiry of nine months, although the plaintiff had approached the defendant for extension of time.

Reference was made to defendant's letter to PKNS dated 7 August 1996 (p. 91 of AR) wherein it was proposed that PKNS transfer the said land direct to the plaintiff. In response as contained in letter dated 14 September 1996 (p. 92 of AR), PKNS disagreed with the defendant's proposal but agreed to transfer the said land to the defendant. However, the fact remained that the defendant had failed to apply or at all to the State Authority for written consent to transfer the said land to the plaintiff. Clearly, the defendant had failed to fulfil the condition precedent as provided under cl. 2(1)(i) of the agreement.

As to the law on contingent contract, we can do no better than to refer to Federal Court case of *National Land Finance Co-operative Society Ltd. v. Sharidal Sdn. Bhd.* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 where Salleh Abas CJ (as he then was) said:

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect which is that a contract shall not take effect unless and until the condition is fulfilled. (see *Trans Trust S.P.R.L v. Emerton; Bush v. Property, and Bloodstock Ltd*. per Sachs, LJ. Until the FIC approval was given liability for further performance remained unenforceable, ie, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is the effect laid down by s. 33(a) of the Contracts Act.

The learned Chief Justice went on to say on the same page:

> As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with s. 33(b) of the Contracts Act 1950 ... .

On the authority of the abovementioned case, upon failure of the defendant in obtaining written consent from the State Authority within the stipulated period, such failure would attract the operation of cl. 4 of the agreement, which entitled the plaintiff for refund of the deposit.

The main thrust of the defendant's case was that the defendant was entitled to invoke cl. 20 of the agreement which enable defendant to forfeit the deposit on the ground that plaintiff had failed to apply for the Foreign Investment Committee (FIC) approval pursuant to cl. 2(1)(ii) of the same. It is true that plaintiff had failed to make such application. Our perspective of the case was that even if such application was made and approval obtained, still the transfer of the said land to the plaintiff could not be effected as prior consent of the State Authority was not obtained. Hence, in our view, failure by plaintiff to apply for FIC approval was of no consequence.

From our scrutiny of the affidavit evidences and in the light of our finding as set out herein, we hold that there is no triable issue which merit this case to go for full trial. Thus, we agree with the finding of the learned trial judge:

> Berdasarkan isu-isu yang Plaintif telah bangkitkan dalam kes ini, kes ini sesuai untuk Penghakiman Terus kerana isu "Kebenaran Bertulis Pihak Berkuasa Negeri atau PKNS adalah satu persoalan undang-undang yang boleh ditentukan menerusi authoriti-authoriti sahaja, isu fakta dalam kes ini adalah samada Defendan telah memohon kebenaran Pihak yang relevan untuk proses pindahmilik. Harta tersebut dan isu ini boleh ditentukan daripada dokumen-dokumen yang telah difailkan oleh Plaintif dan Defendan dalam kes ini, dan dokumen-dokumen tersebut mengandungi fakta-fakta yang jelas dan tidak memerlukan satu pendengaran lisan.

In the premise and for reasons abovestated, we dismiss the appeal with cost. We order the deposit to be paid to the plaintiff towards the account of taxed cost.